SUPREME COURT, U. S.

No. 547

AUG 29 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NORTHWEST ENGINEERING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

NORTHWEST ENGINEERING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Justices of the Supreme Court of the United States:

Northwest Engineering Company, Petitioner herein, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia, entered on June 3, 1967, granting the National Labor Relations Board's petition to enforce its Order dated September 21, 1964, as amended on March 3, 1966, which requires Petitioner to cease and desist from certain alleged unfair labor practices and affirmatively, to post a notice and to bargain with the Union on demand.

On March 24, 1967, the court below handed down its opinion in the matter. On April 5, 1967, Petitioner petitioned to reconsider, as did the Union. On April 21, 1967, both petitions were denied. On June 3, 1967, the court below ordered, adjudged and decreed the Petitioner herein to abide by and perform the direction of the Board's order, as amended.

OPINIONS BELOW

The original decision of the National Labor Relations Board is reported at 148 NLRB 1136 (1964). The Board issued a Supplemental Decision and Order reported at 158 NLRB No. 48 (1966). The decision of the Court of Appeals is reported in 376 F.(2d) 770, and is printed in the Appendix hereto, at pp. App. 1-6.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was made and entered on June 3, 1967, and a copy thereof is printed in the Appendix at pp. App. 7-8.

The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

QUESTION PRESENTED

The question presented here arises out of a policy shift of the National Labor Relations Board manifested by its decision in *Bernel Foam Products Co.*, 146 NLRB 1277 (1964), which directly overruled *Ajello Dairy Farms*, 110 NLRB 1365 (1954). Specifically, the question is important in the administration of the National Labor Relations Act in that the basic right of employees to select or reject representatives for purposes of collective bargaining through the election procedures established by Con-

gress are being circumvented. This case gives the Court the opportunity to clearly enunciate on the following substantive and procedural question:

> Does the power of the National Labor Relations Board under §10(c) of the Act to order affirmative relief in aid of a cease and desist order include the power to order an employer to recognize and bargain collectively with a union where—
>
> (1) the employees reject the union in an election conducted by the Board at the union's instance?
>
> (2) the union knows of alleged unfair labor practices prior to the election, but does nothing until after it loses the election?
>
> (3) the unfair labor practices are not aggravated and do not include discriminatory discharges, clear and vitriolic threats of retaliation or reprisal or a rejection of the collective bargaining principle?
>
> (4) the proof of majority status of the union *ante* election relied on by the Board is
>
> (a) shown to have been collected by a union organizer by misrepresentations as to its use;
>
> (b) admitted into evidence without affirmative proof of authentication.
>
> (5) there is no charge filed within the six (6) month statutory period alleging a refusal to bargain with the union.

PROCEEDINGS BELOW

These proceedings grow out of a petition for certification filed by United Steelworkers of America, AFL-CIO (hereinafter "Union"), with the National Labor Relations Board (hereinafter "Board"), on March 8, 1963, pursuant to §9(c) of the National Labor Relations Act, as amended,

29 USC §151 *et seq.* (hereinafter "the Act"), seeking an election among employees of Northwest Engineering Company (hereinafter "the Company"), Petitioner herein. On May 8, 1963, the Board conducted such an election in which 743 of the 753 eligible voters participated. The Union lost the election 377 to 362, two ballots being challenged and two being void.

Thereafter, the Union filed objections to Company conduct claimed to have affected the outcome of the election. An unfair labor practice charge of violating §8(a)(1) of Act covering the same and additional conduct was simultaneously filed as permitted by §10(b) of the Act. A complaint issued on the charge and the §9 (election objection) and §10 (unfair labor practice) proceedings were consolidated for hearing. On March 27, 1964, the Trial Examiner issued his decision dismissing the objections and complaint for total lack of merit.

On September 21, 1964, the Board reversed the Trial Examiner, found merit to the complaint, and ordered a new election be held. 148 NLRB 1136 (1964)

Dissatisfied with the order for a new election, the Union moved the Board to reconsider and amend its order to coincide with a new policy of the Board as enunciated in *Bernel Foam Products Co.*, 146 NLRB 1277 (1964), and further refined in *Irving Air Chute Co.*, 149 NLRB 627 (1964). The Board so amended its order and remanded the case to the Trial Examiner to determine whether a bargaining order should issue without a new election.

The Trial Examiner conducted a supplemental hearing and, following the receipt of evidence over the Company's strenuous objection, declared in a Supplemental Decision dated August 27, 1965, that the Union once had a majority

status, that the Board had previously found unfair labor practices had been committed and, *ergo*, consistent with the Board's new policy, the Company must, *inter alia*, recognize and bargain with the Union upon request. On May 3, 1966, the Board affirmed. 158 NLRB No. 48 (1966)

The Union petitioned the Court of Appeals for the District of Columbia for review of the Board order, seeking additional findings and relief. The Board petitioned the same court for enforcement. On March 24, 1967, the Court of Appeals rendered its decision denying the Union's petition for review and granting the Board's petition for enforcement. Both Union and Company petitioned for rehearing and both petitions were denied on April 21, 1967. The Court's decree was entered June 3, 1967.

STATUTES INVOLVED

The pertinent portions of the National Labor Relations Act, 29 USC §151, *et seq.*, are set forth in the Appendix, at pp. App. 8-9.

STATEMENT OF THE CASE

In late February, 1963, the Union began an organizing campaign among the more than 700 production and maintenance workers at the Company's Green Bay, Wisconsin, shovel and crane plant. On March 7, 1963, the Union filed a petition for a board-conducted election and simultaneously sent a letter to the Company claiming that it represented a majority of the employees and requesting a negotiating meeting. The Company replied that it would recognize the labor organization duly certified following a Board-conducted election.

Accordingly, acting upon the Union's petition, the Board directed an election, which was held on May 8, 1963. The Union lost the election, 377 to 362.

After various maneuvers by the Union and action by the Board (see Proceedings Below, *supra*), a supplementary hearing was held by the Trial Examiner at which time the efficacy of the Union authorization cards and their authenticity became an issue. Over the Company's strenuous objection, 453 Union-solicited cards were admitted into evidence without proper foundation or authentication. To the Company's contention that §10(b) of the Act requires that the rules of evidence applicable to the United States District Courts be followed in Board proceedings insofar as practicable, the Board affirmed the Trial Examiner's evidentiary ruling on the grounds that it was "reasonable procedure" in view of "the large number of cards involved" and that the Company had "uncircumstantially" made an "extra-judicial admission" because it had received the cards in its possession prior to hearing and had not raised any issue other than a few questioned signatures.

These cards having been admitted into evidence the Company contended that they were invalid for the purpose intended because they were misleading on their face and tainted by the atmosphere in which they were solicited. Such card reads as follows:

AUTHORIZATION

I hereby request and accept membership in the UNITED STEELWORKERS OF AMERICA, and of my own free will hereby authorize the UNITED STEELWORKERS OF AMERICA, its agents or representatives, to act for me as a collective bargaining agency in all matters pertaining to rates of pay, wages, hours of employment, or other conditions of

employment, and to enter into contracts with my employer covering all such matters, including contracts which may require the continuance of my membership in the UNITED STEELWORKERS OF AMERICA as a condition of my continued employment.

DATE .....

Signature

ADDRESS .....

Street City Zone State

HOME PHONE ..... COMPANY .....

DEPT. ..... SHIFT .....

This card when signed will be shown to no one except an Authorized Representative of the U.S. Government

Please fill out entire card

The Trial Examiner held that evidence of the Union's exaggerations or even untrue statements surrounding the card solicitation was insufficient to invalidate the cards as proof of majority status; that the Courts had not followed this rule, but he was bound by Board decisions. (Jt. App. 230)

Reasons for Granting the Writ

The decision of the Court of Appeals for the District of Columbia herein should be reviewed because it establishes important substantive and procedural principles affecting the right of employees to freely choose their bargaining representatives by secret ballot in the manner specified by Congress in §9(c) of the Act. While this Court specifically held in *Franks Bros.* v. *NLRB*, 321 U.S. 702 (1944), that the Board had the power under §10(c) of the Act to affirmatively order an employer to bargain with a union even though there had been no election, this affirmance came where the union had withdrawn the petition for election upon discovering alleged unfair practices—*i.e.*, acted in conformance with the election rule reaffirmed by the Board in *Aiello Dairy Farms*, 110 NLRB 1365 (1954).

This case, at the supplemental Board decision level, extended the rule in *Franks Bros., supra*, to affirm a bargaining order where the union had proceeded to an election in the face of existing unfair labor practices and then *lost* the election. This result was a permissible rationale by the Board because it had reversed its prior election rule in *Bernel Foam Products Co.*, 146 NLRB 1277 (1964), and *Irving Air Chute Co.*, 149 NLRB 627 (1964).

Under the rule established by the Court below in affirming the Board's order, employees are denied the right to reject a collective bargaining representative and are forced into representation in the name of "effectuating policies of the Act" through Board-imposed remedy. The Circuit Courts have reached conflicts in both the substantive and procedural questions involved.

1. There is a direct conflict between the decision of the Court of Appeals for the District of Columbia herein and a decision of the Court of Appeals for the Second Circuit.

After the employees rejected the union in the Board-conducted election, a full and complete hearing was had before the Trial Examiner on the alleged violations of the Act. The Trial Examiner, who saw the witnesses, observed their demeanor and resolved all credibility issues from face-to-face confrontation, issued his Decision and Report on Objections recommending dismissal of the complaint and overruling the objections *entirely*. (Jt.App., pp. 161 *et seq.*) The Board reversed, and the Court below affirmed, saying:

> "While the evidence is hardly overwhelming, our evaluations are irrelevant because, after examining the record, we have concluded that the Board's findings do represent reasonable interpretations of the evidence."

Nevertheless, the Court below sustained the Board's Order requiring Northwest to bargain with the Union on demand, despite the employees' prior rejection in a secret ballot Board-conducted election and despite the lack of "overwhelming evidence" of any rejection by Northwest of the collective bargaining principle.

The Court below openly states its conflict with the majority decision of the Second Circuit in *NLRB* v. *Flomatic Corp.*, 347 F. (2d) 74 (CA-2, 1965). There it was held that a bargaining order should not issue as part of the remedy for §8(a)(1) violations unless the violations are

"flagrant" and stem from an "aggressive or planned campaign at dissipating union strength by resort to threats, discharges, or refusals of recognition." *Supra*, p. 78. This rule would seem to be consistent with this Court's rule in *Franks Bros. Co.* v. *NLRB, supra*, where a bargaining order was sustained upon a showing of the employer's "stubborn refusal to abide by the law." (p. 705) By way of contrast, Northwest Engineering was "interpretively" found to have committed unfair labor practices.

The Court of Appeals for the Seventh Circuit has attempted to state a rationale for the divergent views expressed between the circuits. In *Wausau Steel Corp* v. *NLRB*, ... F.(2d) ....., 55 CCH Lab. Cases ¶11,849, (CA-7, 1967), with a dissent, a bargaining order issued by the Board was enforced on the ground that it was within the bounds of allowable discretion and not clearly inappropriate. The Court there noted that in other cases where a bargaining order was not issued but a new election ordered instead, the courts relied on record evidence independent of the election results which indicated a lack of majority status in the union. Further, the Court observed that bargaining orders were generally enforced where there was strong evidence of majority status existing prior to the commission of unfair labor practices. The majority then concluded that there was in the case before it only authorization cards to prove majority status and only the election results to prove minority status; that there was "a dearth of evidence" and consequently it was impossible to determine whether the unfair conduct affected the employees' freedom of choice. Accordingly, it held that the Board's *inference* that the un-

lawful conduct dissipated the union's majority status could not be set aside.[1]

The conflict between the decision here and *Flomatic*, with the attendant attempt by the other circuits to find a common ground, emphasizes the need for penetrating examination and resolution of the conflict by this Court. Even the most provocative article on the subject of extended Board remedies has suggested that the Board should act with restraint and restrict its use of bargaining orders to cases involving discriminatory discharges or *clear threats* of retaliation. Bok, *The Regulation of Campaign Tactics*, 78 Harv. L. R. 38, 138 (Nov., 1964)). This Court's definitive ruling is desirable and this case presents a ripe situation for setting forth appropriate distinctions in this regard.

2. The decision below decides an important question of federal law which has not been, but should be, settled by this Court.

The Court below states that, "It was duly found, by both the Trial Examiner and the Board, that prior to the

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[1] It is respectfully submitted that this decision lacks the ring of clear logic that Judge Hastings generally propounds. He states on the one hand that there is inadequate evidence to show that the election results were tainted by unlawful conduct, but then states that the Board's inference of the opposite result cannot be impugned. Overlooked are the propositions that (a) under §10(c) of the Act, the General Counsel has the burden to prove violations by a preponderance of proof, and (b) while the Board may draw inferences, it is permitted to do so only upon *facts found*. *Interlake Iron Corp.* v. *NLRB*, 131 F.(2d) 129 (CA-7, 1942); *NLRB* v. *Pick Mfg. Co.*, 135 F.(2d) 329 (CA-7, 1943). In *Wausau*, the Court admits there is no evidence to support the inference, but nevertheless incongruously says it cannot be set aside.

Company's unfair labor practices a majority of the employees in the appropriate bargaining unit had signed union authorization cards." This statement passes over without comment or resolution two issues, tried before the Trial Examiner and the Board and briefed and argued to the Court below: (a) that the cards were an accurate indicia of majority status; and (b) that they were properly received into evidence.

(a) Are authorization cards probative evidence of majority status ante-unfair labor practices?

It has been said in several cases in several Circuits in several ways that union authorization cards are a "notoriously unreliable method of determining majority status of a union." *Peoples Service Drug Stores, Inc.* v. *NLRB*, 375 F.(2d) 551 (CA-6, 1957); *NLRB* v. *Morris Novelty Co., Inc.*, ... F.(2d) ....., 55 CCH Lab. Cases ¶11,998 (CA 8, 1967); *Pizza Products Corp.* v. *NLRB*, 369 F.(2d) 431 (CA-6, 1966); *NLRB* v. *Flomatic Corp., supra; NLRB* v. *Gorbea, Perez & Morell, etc.*, 300 F.(2d) 886 (CA-1, 1962); *NLRB* v. *Hannaford Bros.*, 261 F.(2d) 638 (CA-1, 1959). Even Board Chairman McCulloch has noted that unions win only 52% of the elections where they present authorization cards from 50% to 70% of the employees. See statement quoted in *NLRB* v. *Johnnie's Poultry Co.*, 344 F.(2d) 617 (CA-8, 1965).

Despite this asserted unreliability, the various circuits have independently developed conflicting rules under which authorization cards have been held to be satisfactory or unsatisfactory proof of majority status. Thus has developed the doctrines applicable to single purpose and dual purpose authorization cards. The single purpose card which recites only that it is to be used to evidence interest

in obtaining an NLRB-conducted election does not pose a problem. Here, the Board and courts have uniformly held that such cards do not constitute proof of majority status so as to form a basis for a bargaining order as an affirmative remedy.

On the other hand, so-called dual purpose cards have brought conflicting results in the various circuits. Thus, in the Fifth and Sixth Circuits, cards which call for an election *and* authorize representation would appear to be invalid proof of majority status if there is *any* showing of misrepresentation or misunderstanding as to the meaning or intent of the signers. *NLRB* v. *Peterson Bros., Inc.*, 342 F.(2d) 221 (CA-5, 1965); *Dayco Corp.* v. *NLRB*, ... F. (2d) ....., 56 CCH Lab. Cases ¶12,113 (CA-6, 1967). Subjective intent of the signers in these circuits is an important issue. *Engineers & Fabricators, Inc.* v. *NLRB*, ... F. (2d) ....., 55 CCH Lab. Cases ¶11,850 (CA-5, 1967). In the Seventh, Tenth and District of Columbia Circuits, however, if the dual purpose is plain on the face of the card, *cf., Int'l Union of Elec. Wkrs. (SNC Mfg. Co.)* v. *NLRB*, 352 F.(2d) 361 (CADC, 1965), the card will generally constitute sufficient evidence of majority status to support a bargaining order, *Int'l Union UAW* v. *NLRB (Aero Corp.)* 363 F. (2d) 702 (CADC, 1966); *NLRB* v. *C.J. Glasgow Co.*, 356 F.(2d) 476 (CA-7, 1966), *Furr's, Inc.* v. *NLRB*, ... F.(2d) ....., 55 CCH Lab. Cases ¶11,734 (CA-10, 1967), at least, in the absence of substantial evidence of active and overt fraud. See, *NLRB* v. *Kroehler*, 328 F.(2d) 770 (CA-7, 1964); *Amalgamated Clothing Workers* v. *NLRB*, 365 F.(2d) 898 (CADC, 1966). In these circuits it is even doubtful that evidence of the signers' intent can be admitted into evidence. See, *Joy Silk Mills* v. *NLRB*, 185 F.(2d) 732 (CADC, 1950).

Resolution of these conflicting decisions is desirable so that employees' rights are treated uniformly under the Act.

(b) What degree of authentication is required to equate authorization cards to ballots?

The Act provides in §10(b) that the Board shall follow the rules of evidence applicable to the United States District Courts insofar as practicable. In the case at bar the Board admitted some 400 cards into evidence without proof of execution on the theory that to prove each card's authenticity would be impractical. (J.A. 263) The Board has previously held that where a small number of cards are involved, there must be actual, individual proof. See, *e.g., Henry Colder Co.*, 163 NLRB No. 13, (1967).

Actually, the rule of evidence applicable in the district courts of the United States is that a writing standing alone does not constitute evidence; it must be accompanied by proof establishing its authenticity and that it was executed by the party by whom it purports to be. See Am.Jur. (*Evid.*) §922, pp. 776-777; *Toho Bussan Kaisha, Ltd.* v. *American Pres. Lines, Ltd.*, 265 F.(2d) 418, 422 (CA-2, 1959); *Summers* v. *McDermott*, 138 F.(2d) 338 (CA-3, 1943); *International Aircraft Trading Co., Inc.* v. *U.S.*, 75 F.Supp. 261, 262 (Ct.Cl., 1947); *cf., Olender* v. *U.S.*, 210 F.(2d) 795, 801-805 (CA-9, 1954) ("official government documents" exception limited to those actually "official").

The viciousness of the Board's ambivalence in application of the evidentiary standard is apparent where it is remembered that these cards are being equated to votes cast in a secret ballot election. These cards are not collected in secret, may not represent the true wishes of those

solicited and, as here, often given upon the representation that there will be a secret ballot. With a large number of cards in issue, to be sure, the proceedings for proof of their authenticity may be protracted if the union is to obtain bargaining rights by "the back door" route. On the other hand, the Board has an adequate and better alternative by merely following the statute: hold an election guaranteeing the secret ballot franchise.

Under the decision below, the Board now has a *carte blanche* to deliver any number of cards to the employer and in the absence of his disproving them, have them admitted into evidence as proof of majority status. The Board has repeatedly said that there are no discovery procedures available under the Act, *Chambers Mfg. Corp.*, 124 NLRB 721 (1959), *enf'd.*, 278 F.(2d) 715 (CA-5, 1960), yet it has adopted a procedure here giving it the unilateral right to demand that employers admit or deny authenticity and if they remain mute, they will be deemed to have made an "extra-judicial admission" of authenticity.

3. The Court below has approved a Board practice which so far departs from accepted practice as to call for an exercise of this Court's power of supervision.

In what is believed to be the first decision of its kind, the Board here ordered Northwest to recognize and bargain with the Union, although *at no time* in these proceedings was Northwest ever charged nor did any allegation of the complaint ever charge that Northwest had refused to bargain when it was under an obligation to do so. The Act provides in §10(b) that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.

Every decision dealing with the efficacy of a bargaining order, in the absence of or in contravention to the results of a Board-ordered election, has had present at the outset an allegation in the complaint that the employer violated §8(a)(5) of the Act. And heretofore, even in the District of Columbia Circuit it was held that there must have been a charge within six months of the violation—albeit, a continuing violation. See, *Int'l. Union, UAW* v. *NLRB, (Aero Corp.), supra.*

Here, there was no charge, *ever*,—no allegation of refusal to bargain, *ever*. This procedure of the Board is so beyond the accepted practice as to call for this Court's supervisory review and reversal.

4. The questions presented are important to the administration of the National Labor Relations Act and should be resolved by this Court.

The Act, in §7, guarantees to employees the right to participate or to refrain from participating in concerted activities. This announced and explicit policy of Congress is being seriously and substantially intruded upon by recent developments of Board-created law now being approved in varying degrees in the Courts of Appeal. Conflicts are developing and uncertainty is present. The Board, on the other hand, is pushing to extend its remedial powers by devising new and different affirmative relief. It is appropriate to review the Board's power in this regard and establish firm guidelines for future decisions.

This Court has previously said that the Board's power to order affirmative relief does not confer upon it the power to inflict any penalty it may choose just because the policies of the Act might be thereby effectuated, because affirma-

tive orders must be incidental to and in aid of the primary right of the Board to stop and restrain violations. *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 235-236 (1938); *Int'l. Union, UAW* v. *Russell*, 356 U.S. 634, 642-643 (1958). In the face of an announced intent, manifested in this case, to expand and invent new remedies, failure of the Court to now pronounce its views may well lead to further conflicts among the Circuits and the development of relationships premised on faulty assumptions, all in derogation of employees rights and the intent of Congress.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WALTER S. DAVIS,
Counsel for Northwest Engineering Company

Of Counsel:
F. N. TROWBRIDGE

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,921

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

NORTHWEST ENGINEERING COMPANY,
INTERVENOR

No. 20,211

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.

NORTHWEST ENGINEERING COMPANY,
RESPONDENT

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
INTERVENOR

On Petition to Review and on Petition to Enforce Orders of the National Labor Relations Board

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Decided March 24, 1967

Mr. Michael Gottesman, with whom *Mr. Elliot Bredhoff* was on the brief, for petitioner in No. 18,921 and intervenor in No. 20,211.

Mrs. Janet Kohn, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *Warren M. Davison,* Attorney, National Labor Relations Board, were on the brief, for respondent in No. 18,921 and petitioner in No. 20,211.

Mr. Walter S. Davis of the bar of the Supreme Court of Wisconsin, *pro hac vice,* by special leave of court, with whom *Mr. E. Riley Casey* was on the brief, for respondent in No. 20,211 and intervenor in No. 18,921. *Messrs. O. S. Hoebroeckx* and *Richard P. McLaughlin* also entered appearances for respondent in No. 20,211 and intervenor in No. 18,921.

Before BASTIAN, *Senior Circuit Judge,* LEVENTHAL and ROBINSON, *Circuit Judges.*

LEVENTHAL, *Circuit Judge*: We are called upon to review an order of the National Labor Relations Board issued on September 24, 1964, 148 N.L.R.B. 1136, and amended after further hearings on May 3, 1966, 158 N.L.R.B. No. 48. The facts and issues are fully detailed in those opinions and we pause only to refer to the most salient findings. The Board found that after the petitioner, United Steelworkers (Union), began its organizing drive at the Green Bay, Wisconsin shovel and crane plant of Northwest Engineering Co. (Company), the Company responded with a flurry of promises and threats, all designed to an impermissible degree to fob off unionization. The Board's findings of fact are conclusive on us if supported by substantial evidence on the record as a whole. National Labor Relations Act, 61 Stat. 146 (1947), as amended, 29 U.S.C. § 160(f) (1964); Administrative Procedure Act, 5 U.S.C. § 706. While the evidence is hardly

overwhelming, our evaluations are irrelevant because, after examining the record, we have concluded that the Board's findings do represent reasonable interpretations of the evidence.

We turn to the Board's remedies. The Board issued the customary order requiring the Company to cease and desist from interferences with union activity, and in addition set aside a certification election adverse to the Union, and ordered the Company to bargain with the Union. Both Union and Company protest the validity of the order, the Union on the ground that it does not go far enough, the Company on the ground that it goes too far. We affirm.

Section 10(c) of the Act, 29 U.S.C. §160(c) (1964), authorizes the Board when it has found a violation to "issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]. . . ." In fashioning remedies the Board is drawing on its peculiar expertise and reservoir of informed judgment gained from continuous and intimate study of labor relations problems. Because of this, courts must pay special deference to the Board's choice of a remedy, see *Fibreboard Paper Prod. Corp.* v. *NLRB*, 379 U.S. 203, 215-17 (1964). "[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." *Consolo* v. *FMC*, 383 U.S. 607, 621 (1966). With this caution in mind, we cannot say it was an abuse of discretion for the Board to fail or refuse to grant the Union's prayer that it "award to the employees . . . the benefits they would most likely have achieved had bargaining occurred" or "order the Company to bargain now with

the Union over benefits to be provided for the retroactive period."

We likewise reject the Company's objection challenging the remedy as excessively disproportionate to the violation charged. The 1964 opinion and order of the Board found a violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) (1964), in that the Company interfered with, coerced, and restrained its employees in the exercise of their rights under Section 7 to organize and bargain collectively. In addition to the customary cease and desist order, the Board set aside the previous certification election, which the Union had lost by a slim vote, and ordered a new one. Even though there had been no charge or finding of a violation of Section 8(a)(5), which proscribes refusals to bargain with representatives of employees, the Board later, on the Union's motion, reopened the proceedings. It was duly found, by both the Examiner and the Board, that prior to the Company's unfair labor practices a majority of the employees in the appropriate bargaining unit had signed union authorization cards. Cf. *Amalgamated Clothing Workers (Hamburg Shirt Corp.)* v. *NLRB*, —— U.S.App.D.C. ——, —— F.2d —— (Nos. 19897, 19940, decided December 15, 1966) (slip op. at 7-9). In its 1966 Supplemental Decision and Order the Board directed the Company to bargain with the Union without the necessity of a new election.

In attacking this bargaining order the Company relies on the recent Second Circuit case of *NLRB* v. *Flomatic Corp.*, 347 F.2d 74, 77-80 (1965). In that opinion the court refused to enforce a bargaining order entered to rectify a violation of Section 8(a)(1) alone. Judge Anderson, writing for the court stated that "restraint" was indicated in regard to the dictation of the "strong medicine"

of a bargaining order, because of its troublesome tendency to encroach on the employees' Section 7 right *not* to organize a labor union and the Section 9(c)(1) right to a secret ballot election.[1] Judge Anderson implies that a bargaining order would be approved only when the Company's conduct consisted of a "broad-gauged campaign" that was "flagrantly hostile to the organizing efforts" of the Union, where there were "glaring violations." He states that a bargaining order is inappropriate in the case of "a borderline, unaggravated § 8(a)(1) violation, standing alone," resulting in only "a moderate unbalancing of an election by an employer." The opinion concludes that in such a case "a more appropriate remedy" is a cease and desist order coupled with the granting of a new election.

In our view the beacon with the light that guides this court is not the *Flomatic* opinion, but the partial dissent of Judge Hays, 347 F.2d at 80-81. As we have stated, the choice of remedies is primarily within the province of the Board. The Board has the responsibility for deciding what relief is most "appropriate" and in the absence of a clear abuse of discretion we will not interfere. Even where the particular remedy carved out by the Board has an impact on other values protected by the National Labor Relations Act, it is the Board that has the primary duty of reconciling sometimes divergent interests. It is not judicial abdication to treat with respect the agency's

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[1] In Local 57, ILGWU (Garwin Corp.) v. NLRB, —— U.S. App.D.C. ——, —— F.2d —— (Nos. 19478, 19624, decided January 11, 1967), this court gave similar reasons for refusing to enforce a bargaining order against a "runaway shop." However in *Garwin*, unlike this case, the order set aside would not have served to protect any Section 7 rights of employees who chose the Union as their representative.

determination as to the powers properly invoked in coping with a problem. *Philadelphia Television Broadcasting Co.* v. *FCC*, 123 U.S.App.D.C. 298, 300, 359 F.2d 282, 284 (1966). The inquiry is whether on the basis of the evidence it had before it the Board adopted a remedy reasonably calculated to effectuate the policies of the Act.

The Supreme Court has recently re-emphasized the established rule that courts must give deference to the choice of remedy made by the administrative agency, unless it reflects so gross an abuse of power as to be arbitrary. See *Consolo* v. *FMC, supra; FCC* v. *WOKO, Inc.*, 329 U.S. 223, 227-28 (1946). In the particular area of federal regulation of labor relations the courts do not have a charter to insist upon especially strong evidence of violation as a precondition to an affirmative remedy within the Board's jurisdiction. *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404, 407 (1962); *NLRB* v. *Camco, Inc.*, 340 F.2d 803, 808 (5th Cir.), *cert. denied*, 382 U.S. 926 (1965).[2] In the present case the Board's findings establish not only a violation of Section 8(a)(1), but also an interference with the bargaining agent designated by a majority. We are unable to say that it was arbitrary for the Board to conclude that a reasonable vindication of the Act and its purposes is best served by returning these parties to the *status quo ante* and compelling the Company to commence bargaining.

The Union's petition to review is denied, and the Board's petition to enforce is granted.

So ordered.

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[2] Compare FCC v. Allentown Broadcasting Corp., 349 U.S. 358 (1955), where the Court rejected a contention that the preponderance of testimony must be "very substantial" to warrant an agency in overturning an Examiner's finding.

(Caption Omitted)

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

(Filed June 3, 1967)
Nathan J. Paulson, Clerk

DECREE

BEFORE: *Bastian, Senior Circuit Judge, Leventhal and Robinson, Circuit Judges.*

The above consolidated cases came on to be heard upon a petition for review and amended petition for review filed by United Steelworkers of America, AFL-CIO and upon the petition of the National Labor Relations Board for enforcement of its Order dated September 21, 1964, against Northwest Engineering Company, its officers, agents, successors, and assigns, as amended May 3, 1966. The Court heard argument of respective counsel on November 22, 1966, and has considered the briefs and transcript of record filed in this cause. On March 24, 1967, the Court, being fully advised in the premises handed down its decision denying the Union's petition to review, and granting the Board's petition to enforce said order, as amended and entered judgment accordingly.

On Consideration Whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the District of Columbia Circuit that the said order, as amended, of the National Labor Relations Board in said proceedings be enforced, and that Northwest Engineering Company, its officers, agents, successors, and assigns abide by

and perform the direction of the Board in said order contained.

Walter M. Bastian
Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

Harold Leventhal
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

Spottswood W. Robinson, III
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

STATUTES

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

"Section 7—

> Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ."

Section 10—

* * *

> "(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at

a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge."

* * *

"Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C)."

* * *

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.: . . ."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NORTHWEST ENGINEERING COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD AND UNITED STEELWORKERS OF AMERICA, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO, IN OPPOSITION

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NATIONAL LABOR RELATIONS BOARD AND UNITED STEELWORKERS OF AMERICA, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO, IN OPPOSITION

United Steelworkers of America, AFL-CIO, was the charging party before the National Labor Relations Board, and intervened in the court below. It is, accordingly, automatically a party herein, although not named in the petition.

The petition raises no question worthy of review by this Court. The Board will undoubtedly so demonstrate in its brief in opposition, and we will not duplicate that showing. Instead, we shall confine this brief to a demonstration that this Court lacks jurisdiction over the petition, because it was not timely filed.

The court below issued its decision *and an accompanying*

judgment[1] on March 24, 1967, and timely petitions for rehearing were denied on April 21, 1967. We believe the time for filing a petition began to run on the latter date, and that the filing of the petition on August 29, 1967, one-hundred-thirty days later, was outside the ninety-day time limit prescribed in 28 U.S.C. Section 2101(c).

Petitioner has apparently assumed that the time for filing did not begin to run until June 3, 1967, the date the court below issued a formal "decree" reiterating the terms of its earlier "judgment."[2] Determination of jurisdiction thus de-

---

[1] Petitioner did not include the "judgment" as part of the certified record transmitted to this Court. Accordingly, we have transmitted a certified record of the judgment to this Court, simultaneously with the filing of this brief.

[2] The *judgment*, entered on March 24, 1967, recited as follows:

"JUDGMENT

"These cases came on to be heard on the record from the National Labor Relations Board, and were argued by counsel.

"ON CONSIDERATION WHEREOF, *it is ordered and adjudged by this court that* in case No. 18,921 the Union's petition to modify orders of the National Labor Relations Board is denied; and *in case No. 20,211 the Board's petition for enforcement is granted.*

"Pursuant to Rule 38(1) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court." (Emphasis supplied.)

The *decree*, entered on June 3, 1967, provided in material part as follows:

"DECREE

". . . On March 24, 1967, the Court, being fully advised in the premises handed down its decision denying the Union's petition to review and granting the Board's petition to enforce said order, as amended *and entered judgment accordingly.*

"ON CONSIDERATION WHEREOF, *it is ordered, adjudged and decreed* by the United States Court of Appeals for the District of Columbia Circuit *that the said order, as amended, of the National Labor Relations Board in said proceedings be enforced,* and that Northwest Engineering Company, its officers, agents, successors and assigns abide by and perform the direction of the Board in said order contained." (Emphasis supplied.)

pends upon whether the time for filing began to run with the entry of the "judgment" (as extended by the petitions for rehearing) or from the later entry of the "decree." We show herein that it was the *judgment*, not the *decree*, which commenced the running of the statutory time period.

28 U.S.C. Section 2101(c) provides as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

This Court has expressly held that the statutory time period begins to run from a "judgment," and not from a subsequent "decree," unless "the lower Court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212 (1952).

Plainly, this case is governed by *Minneapolis-Honeywell*. The judgment "ordered and adjudged" that the Board's petition for enforcement be granted. The decree, inevitably, "ordered, adjudged and decreed" that the Board's order be enforced. The addition of a third operative word, "decreed," is of no more significance here than it was in *Minneapolis-Honeywell*. Indeed, petitioner here fully understood that the judgment of the court below was the decisive document, for it immediately filed its petition for rehearing in the court below without awaiting entry of the formal decree.

In *Minneapolis-Honeywell*, this Court enjoined parties to "take heed of . . . the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. Those statutes are not to be applied so as to permit

a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review." 344 U.S. at 213.

This principle can have no greater importance than in labor cases. Delay in the ultimate effectiveness of a Board order visits untold harm upon the order's intended beneficiaries. Here, for example, the Board ordered petitioner to bargain with the Union. Until that order becomes effective, petitioner's employees will continue to be denied the benefits of collective bargaining. Petitioner withheld the filing of its petition in this Court until what it conceived to be the latest possible date, in order to prolong the enjoyment of its "Union-free" status. The public interests which inhere in the National Labor Relations Act will continually be thwarted if violators can delay the effective date of remedial action by such formalistic devices as computing the time for filing their petitions for certiorari from the date of the "decree" rather than the date of the "judgment."

CONCLUSION

For the foregoing reasons, the petition should be dismissed for want of jurisdiction.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 547

NORTHWEST ENGINEERING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 376 F. 2d 770. The Board's Decision and Order (R. 207-221B, 161-205)[1] and its Supplemental Decision and Order (R. 259-268, 221-258B)

[1] "R." refers to the portions of the record printed as a joint appendix in the court below.

are reported at 148 NLRB 1136 and 158 NLRB 624, respectively.

JURISDICTION

The decree of the court of appeals was entered on June 3, 1967 (Pet. App. 7-8). The petition for a writ of certiorari was filed on August 29, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Board found that, after the union obtained cards from a majority of the employees authorizing it to represent them, the employer engaged in numerous acts of restraint and coercion violative of Section 8(a)(1) of the National Labor Relations Act, which dissipated the union's majority and destroyed the conditions for holding a fair election. The questions presented are:

1. Whether, in these circumstances, the Board properly exercised its remedial authority in ordering the employer to bargain with the union without first requiring the latter to demonstrate its majority support in a Board election.

2. Whether substantial evidence supports the Board's conclusion that the union represented a majority of the employees prior to the employer's unfair labor practice.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519 (29 U.S.C. 151 *et seq.*), are set forth in the Appendix (pp. 8-9) to the petition. Sections 8(a)(1) (29 U.S.C. 158(a)(1)) and 10(e) (29 U.S.C. 160(e)) of the Act are also relevant here.

Section 8(a)(1) provides:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7] * * *.

Sec. 10(e), in pertinent part, provides:

> (e) * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

STATEMENT

A. The Board's Findings of Fact

1. In February 1963, the Union [2] began an organizing campaign among the more than 700 production and maintenance workers at the Company's Green Bay, Wisconsin, shovel and crane plant (R. 224, 163, 260; 59, 148). By March 7, over 400 of the employees had signed cards applying for membership in the

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[2] "Union" refers to United Steelworkers of America, AFL-CIO, which filed the underlying charge in the Board proceeding and intervened before the court of appeals, and is thus a respondent here, along with the Board.

Union, and authorizing it to act as their bargaining agent and "to enter into contracts with my employer" containing union shop provisions (R. 93-94, 132).[3] On that date, the Union submitted some 424 signed authorization cards to the Board's Regional Office, together with a petition for a Board election (R. 93-94, 103-104, 132-145).[4] The same day, the Union sent a letter to the Company asserting that it represented a majority of the employees and requesting a meeting to begin negotiations toward a collective bargaining agreement (R. 104, 146). On March 12, the Company wrote in reply that it would "recognize in collective bargaining only the agency, if any, duly certified to us" by the Board (R. 104, 147).

2. Late in 1962, the Company began working on improvements in its group health insurance plan, and at about the same time the employees, independently, began circulating among themselves petitions directed toward obtaining a more satisfactory plan (R. 208, 209; 87, 17-18). On January 12, Company Vice-President Libert arranged a meeting with employee representatives to discuss insurance coverage and costs (R. 208; 17-18, 25-26). The Company made no mention of the investigation it had already begun,

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[3] A copy of the Union authorization card is reproduced in its entirety at pp. 6-7 of the petition.

[4] By the end of March, according to the Union, an additional 200 employees had signed authorization cards. Fifty of these cards, together with the 424 which had earlier been sent to the Board, were ultimately introduced in evidence in the Board proceeding; the other cards apparently were lost in the interim (R. 94-95, 105.)

and the meeting ended with a statement by President Alan Houston that management would "look into" the matter and that the men "would hear from us" (R. 208; 18-19, 60-61). When the employees present "walked out of the meeting [they] didn't know whether [they would] hear about it again" (R. 27). On March 14, a week after the Union had petitioned for a Board election and had also informed the Company that it represented a majority of the employees, the Company called another meeting, for March 16 (R. 208; 19). By this time, the Company had made its final decision in regard to the coverage of the new plan (R. 209; 86, 83-85). However, at that meeting, the Company did not present its plan, did not indicate that it had already decided upon a plan, and did not proffer any information or proposals (R. 209; 22). Rather, there was merely a general discussion, and one member of the employee group submitted a neighboring plant's insurance plan (R. 209; 19-21, 26-27, 80).

On April 11, the Board's Regional Director directed an election, thereafter scheduled to be held on May 8 (R. 207, n. 2). On April 20, the Company suddenly called the employee committee together and announced its new, substantially improved insurance plan (R. 209; 21-23).[5] This plan, President Houston explained, would, if approved by the employees, go

[5] The monthly cost to the Company for insurance for each employee (for whom the Company paid the premium in full) increased from $4.85 under the old plan to $8.40 under the new plan (R. 46-47). The Company contribution to dependents' insurance went up from $1.94 to $2.80 (*ibid.*).

into effect on May 1, upon expiration of the old plan (R. 209; 23, 80-81).

Two days after the Company announced its new health insurance program, Vice-President Libert initiated two meetings with groups of employees in order to inquire into and discuss grievances of the men in the plant (R. 212; 6-7, 8, 10, 76). Libert asked each foreman to select one or two men from his department, so as to obtain "a cross section" and thereby "get more gripes"; and the men thus selected were called to the "foremen's room" next to Libert's office, and urged by Libert to state their grievances (R. 210; 8, 9, 13-14, 15, 16). The men expressed their dissatisfaction over such matters as pay rates, hours of work, overtime assignments, unavailability of parts that could affect earnings, assignment of employees outside their proper job classifications, and other personnel practices (R. 210; 9-10, 11). On April 30, Libert called a combined meeting of the two groups of employees, described how he had already remedied several of the complaints, and reported that he was "working or looking into the rest" (R. 211; 10-11, 14).

During the same two weeks in which Libert held these grievance sessions, the Company provided its stockroom employees with their first Saturday overtime work since October 1962 (R. 48, 50). Thus, on the two Saturdays immediately preceding the Board election, the Company paid time and a half to some 26 stockroom employees, most of whom were assigned to custodial work rather than their regular duties (R. 212; 29-32, 48). Some of the men washed win-

dows, a job that they had not done in the previous five or six years (R. 213; 50, 48). By the end of the second Saturday, only half of the windows had been washed (R. 213; 49). The Company did not schedule any Saturday work thereafter; the rest of the windows were still unwashed at the time of the Board hearing six months later (R. 213; 49, 48, 29).

On May 7, the eve of the election, L. E. Houston, Chairman of the Board of the Company, made a speech to the employees and their wives—the day shift and night shift separately—in a Green Bay theater that he had rented for the purpose (R. 214; 6-7). At the outset, Houston expressed confidence that what he was about to say would "confirm" what management was "sure" was the employees' "willing-[ness] to discuss either individually or through committees with the management" such matters as working hours, division of work, and the revision of the group health insurance plan (R. 195). He asserted that "the great question" before the employees was whether they "want now to give up a wholesome, harmonious relationship" of 40 years for "a way of life that anyone can see * * * [has caused] loss of time, knocked heads, homes damaged, members of families hurt, and a fear of the future brought about by men allowing some group from outside determining their future" (R. 214; 195). Houston reiterated management's interest in resolving grievances, and then exhorted (R. 212, n. 10, 214; 196):

> May the recent happenings show to the management and you men that closer open discussions started by any of the team will bring out into the open, for investigation and correction

any problems that might work to the disadvantage of the company's or employees' welfare.

Houston went on to remind the men and their wives in detail of the Company's past generosity, to emphasize the Union's inability to raise wages, to threaten the loss of perquisites such as the existing training opportunities leading to "better jobs and greater earnings," and to warn of further deprivations should the Union be selected (R. 214-216; 196-205).[6]

3. On May 8, the day after Houston's speech, the Union lost the Board election, 377 votes to 362 (R. 207, n. 2; 148). The Union filed objections asserting that the Company's conduct had unlawfully affected the result of the election (R. 7). During June and July of 1963, while the objections were pending, the Company took the following action: On June 20, for the first time in several years, the Company announced a bonus; all employees were to receive a five percent bonus on their earnings beginning July 1, payable at six-month intervals beginning in January

---

[6] In relevant part, Houston stated:

> We know, and we understand the outsiders have admitted they cannot do anything in the way of increasing your earnings.
>
> One thing they might do if you vote for a union is to assure that through continual harassment your earnings may be reduced unnecessarily. * * *
>
> If you men vote for a union you never again will see a bulletin by the company telling you of a new plan such as the birthday bonus, additional compensation by %, Trust Fund or Pension Plan. * * *
>
> We will be forced to play a waiting game. * * *
>
> Under a union collective bargaining starts fresh. What might that mean. [R. 214, 215; 201, 204, 205.]

1964 (R. 217; 12). And, in late July, the Company announced a plant-wide increase in vacation pay.[7]

B. The Board's Decisions and Order

The Board concluded that the Company had restrained and coerced its employees, in violation of Section 8(a)(1) of the Act, by the calculated timing of its announcement of increased insurance benefits, by questioning employees concerning their grievances and adjusting grievances, by granting employees extraordinary overtime, by threatening economic reprisals should the Union win the election, and by promising further benefits if the employees repudiated the Union—all in the period of the two and a half weeks immediately preceding the Board election (R. 210; 212, 213-214, 216). The Board also determined that the Company had further violated Section 8(a)(1) by granting a bonus and increased vacation pay while objections to the election were pending (R. 218). Finally, the Board found that the Union had valid authorizations from a majority of the employees prior to the Company's pre-election unfair labor practices, and

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[7] The Company determines vacation pay by multiplying each employee's average hourly rate by a standard number of hours fixed by the Company as the workweek for the full work force; this figure is then multiplied by the number of vacation weeks to which the employee is entitled (R. 217; 40, 81-82). In 1963, the Company changed to a standard workweek of 45 hours, in contrast to the 40 hours used in 1962 and the preceding four years (R. 217; 81, 82, 40, 43). This change was made even though Company records show that fewer, not more, hours were worked in each month during the first half of 1963 than in the same months during 1962 (R. 218, n. 18; 154-157).

that those unlawful practices had dissipated the Union's majority support and had also destroyed "the conditions for a fair election in which the Union could have demonstrated that majority" (R. 265-267).[8] Accordingly, the Board ordered the Company to cease and desist from the unfair labor practices found, and to bargain with the Union upon request (R. 267-268, 219-221B).[9]

C. The Decision of the Court of Appeals

The court of appeals sustained the Board's findings of fact, concluding that they "represent[ed] reasonable interpretations of the evidence" (Pet. App. 2-3). The court enforced the Board's order in full, stating (Pet. App. 6):

> In the present case the Board's findings establish not only a violation of Section 8(a)(1), but also an interference with the bargaining agent designated by a majority. We are unable to say that

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[8] In its initial Decision and Order, the Board, upon finding the violations of Section 8(a)(1) described above, issued a cease and desist order, set aside the election, and directed that a new election be held (R. 219-221). Thereafter, upon motion by the Union asking the Board to reconsider its direction of a new election, the Board remanded the case for a further hearing to permit a showing—as the Union had offered to prove in the original hearing (R. 259, n. 2; 58-59)—that the Union had achieved majority status prior to the Company's unfair labor practices, and to consider further the question of the appropriate remedy (R. 130-132).

[9] The Board also sustained the objections to the election, and, since it determined that a bargaining order was appropriate rather than a new election, it dismissed the election petition (R. 267-268, 266, n. 12).

it was arbitrary for the Board to conclude that a reasonable vindication of the Act and its purposes is best served by returning these parties to the *status quo ante* and compelling the Company to commence bargaining.

ARGUMENT

The decision of the court of appeals is correct and there is no conflict of decisions. There is thus no occasion for further review.

1. Contrary to petitioner Company's contention (Pet. 8-9), the holding of the court below, in enforcing the Board's bargaining order in the circumstances of this case, was clearly proper and presents no novel issues. As petitioner concedes (Pet. 8), *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, holds that, where the union had the support of a majority of the employees prior to the employer's unfair labor practices and those unfair labor practices (in that case an unlawful refusal to bargain) dissipated that majority, the Board is empowered to order the employer to bargain with the union without first requiring it to win a Board election. And the courts of appeals have uniformly agreed that the same principle sustains the Board's power to issue a bargaining order where the union which originally enjoyed majority support went to a Board election, lost that election, and the election was then set aside by the Board because of the employer's unfair labor practices.[10]

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[10] See *Colson Corp.* v. *National Labor Relations Board*, 347 F. 2d 128, 138-139 (C.A. 8) certiorari denied, 382 U.S. 904; *Irving Air Chute Co.* v. *National Labor Relations Board*, 350

Nor are such precedents inapposite because here the Union's majority was dispelled by employer conduct which constituted restraint and coercion within the meaning of Section 8(a)(1) of the Act, but did not involve an unlawful refusal to bargain within the meaning of Section 8(a)(5). It is well settled that a bargaining order may be equally as appropriate to remedy violations of Sections 8(a)(1) or 8(a)(3),[11] as violations of 8(a)(5) itself, where by those violations the employer has sought to avoid the bargaining obligation that otherwise would have arisen.[12]

F. 2d 176, 182 (C.A. 2); *International Union of Electrical Workers* v. *National Labor Relations Board*, 352 F. 2d 361, 363 (C.A. D.C.) certiorari denied, *sub nom. SNC Manufacturing Co.* v. *National Labor Relations Board*, 382 U.S. 902; *National Labor Relations Board* v. *Frank C. Varney Co.*, 359 F. 2d 774, 775-776 (C.A. 3); *Master Transmission Rebuilding Corp.* v. *National Labor Relations Board*, 373 F. 2d 402 (C.A. 9); *National Labor Relations Board* v. *Southbridge Sheet Metal Works*, No. 6875 (C.A. 1), decided July 17, 1967, 65 LRRM 2916, 2917-2918. Those decisions approve the Board policy enunicated in *Bernel Foam Products Co.*, 146 NLRB 1277, that, where an employer's unfair labor practices or other preelection misconduct require the Board to set aside an election, the Board will not regard the union's participation in the election as a waiver of its right to file an unfair labor practice charge relating to the employer's prior unlawful refusal to bargain.

[11] Section 8(a)(3) (29 U.S.C. 158(a)(3)), a companion provision to 8(a)(1) and 8(a)(5), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *."

[12] *D.H. Holmes Co.* v. *National Labor Relations Board*, 179 F. 2d 876, 879-880 (C.A. 5) (Section 8(a)(1)); *National Labor Relations Board* v. *Caldarera*, 209 F. 2d 265, 268-269

National Labor Relations Board v. *Flomatic Corp.*, 347 F. 2d 74 (C.A. 2), referred to by petitioner (Pet. 9-10, 11), is not to the contrary. The Second Circuit there did not reject the principle that a bargaining order could be an appropriate remedy for a Section 8(a)(1) violation. Rather, its refusal to enforce such an order in *Flomatic* rested on the special circumstances of that case, *i.e.*, that there was only "a borderline, unaggravated § 8(a)(1) violation, standing alone" (347 F. 2d at 79), or, as the Second Circuit has subsequently termed it, "only a minimal Section 8(a)(1) violation." *Irving Air Chute Co.* v. *National Labor Relations Board*, 350 F. 2d 176, 182 (C.A. 2); *National Labor Relations Board* v. *Gotham Shoe Mfg. Co.*, 359 F. 2d 684, 687 (C.A. 2).[13] Here,

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(C.A. 8) (8(a)(1) and (3)); *Summit Mining Corp.* v. *National Labor Relations Board*, 260 F. 2d 894, 900 (C.A. 3) (8(a)(3) and (1)); *Editorial "El Imparcial," Inc.* v. *National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1) (8(a)(3)); *Piasecki Aircraft Corp.* v. *National Labor Relations Board*, 280 F. 2d 575, 591-592 (C.A. 3), certiorari denied, 364 U.S. 933 (8(a)(3) and (1)); *Local No. 152, Teamsters* v. *National Labor Relations Board*, 343 F. 2d 307, 309 (C.A. D.C.) (8(a)(1) and (3)); *National Labor Relations Board* v. *Delight Bakery, Inc.*, 353 F. 2d 344, 346-347 (C.A. 6) (8(a)(1)); *International Union, United Automobile Workers* v. *National Labor Relations Board*, 363 F. 2d 702, 707, n. 7 (C.A. D.C.), certiorari denied, *sub nom. Aero Corp.* v. *National Labor Relations Board*, 385 U.S. 973 (8(a)(1)); *Wausau Steel Corp.* v. *National Labor Relations Board*, 377 F. 2d 369, 373-374 (C.A. 7) (8(a)(1)); *J.C. Penney Co.* v. *National Labor Relations Board*, No. 8874 (C.A. 10), decided August 29, 1967, 66 LRRM 2069, 2074-2075 (8(a)(1)).

[13] In *Flomatic*, the only violation consisted of the distribution of a letter, just prior to the election, in which the employer promised benefits and invited his employees to deal

on the other hand, the Company engaged in both a series of unlawful acts during the several weeks just prior to the May 1963 election, and also in further violations while objections to that election were pending—thereby demonstrating an intention not only to undermine the first election but any other one that might be held at a later time. Nothing in *Flomatic* suggests that the Second Circuit would refuse to sustain a bargaining order in the instant circumstances.[14]

2. There is likewise no substance to petitioner's contention that the Union's majority status was not properly established.

a. Contrary to petitioner's assertion that the authorization card provided by the Union was "misleading on [its] face" (Pet. 6), the card, titled "AUTHORIZATION", is a clear and "wholly unambiguous"[15] authorization of the Union "to act for me [the sign-

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with him directly rather than through a union—what the court termed "a somewhat overstated reply to the union's charge." 347 F. 2d at 76-77, 78.

[14] Nor is *Wausau Steel Corp.* v. *National Labor Relations Board*, 377 F. 2d 369 (C.A. 7), also cited by petitioner (Pet. 10), inconsistent with *Flomatic*. In *Wausau*, the court found that the employer had engaged in an extensive course of conduct which violated Section 8(a)(1), *i.e.*, promises of benefit, threats of reprisal, and coercive interrogation (see 377 F. 2d at 371-372).

[15] The language is that of the Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *Cumberland Shoe Corp.*, 351 F. 2d 917, 920, referring to an authorization card almost identical to the one involved here (compare 351 F. 2d at 918, with Pet. 6-7).

er] as a collective bargaining agency * * * and to enter into contracts with my employer covering [wages, hours, and other conditions of employment], including contracts which may require the continuance of my membership in the [Union] as a condition of my continued employment" (Pet. App. 6-7). Indeed, the card's opening phrase, in which the signer requests and accepts membership in the Union, would alone suffice to designate that organization a bargaining agent for the signing employee. Cf. *Lebanon Steel Foundry* v. *National Labor Relations Board*, 130 F. 2d 404 (C.A.D.C.), certiorari denied, 317 U.S. 659.[16]

b. There is also no merit to petitioner's claim that the cards were not properly authenticated (Pet. 14-15). The facts relating to this issue may be summarized as follows:

Early in February of 1965, attorneys for the Board's General Counsel and for the Company met to discuss the possibilities of shortening the supplemental hearing to be held on the question of the Union's majority (see note 8, *supra*). Counsel for the Company asked that the General Counsel turn over the authorization cards to him so that his handwriting expert might

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[16] The card is thus not a "dual purpose card" of the kind discussed at Pet. 13-14, *i.e.*, a card that both calls for an election and authorizes representation.

Similarly, no issue is raised by petitioner's allegations that the cards were "tainted by the atmosphere in which they were solicited" (Pet. 6), and that they were "given upon the representation that there will be a secret ballot" (Pet. 15). These are but bare allegations for which petitioner does not, and could not, cite support in the record.

compare them with documents in the Company's possession. The attorneys agreed to this procedure, and further that counsel for the Company would then (as he later put it) "advise [the General Counsel] as to the signatures they [the Company] were questioning," but would not stipulate as to any cards going into evidence (Tr. 67-68). Accordingly, on February 12, the General Counsel delivered to the Company approximately 470 cards, including every card subsequently offered in evidence. Counsel for the Company returned the cards on March 9, just a week before the hearing was to open. He also presented to the General Counsel a list of 24 cards questioned as to authenticity of signature. And he informed the General Counsel that he questioned some 127 other cards on other grounds, such as date and the department in which the signer worked. But he did not (then or later) identify those 127 cards (R. 260-261; 88-92, 101-102). At the hearing, the General Counsel produced testimony by 19 employees, out of the 24 whose signatures were challenged by the Company, that either they or their wives at their direction had signed the questioned cards—which testimony was credited by the Board (R. 261; 106-115, 117, 119). The General Counsel also introduced uncontradicted testimony showing that all of the cards were collected during the Union's campaign in February and March of 1963 (R. 262; 95, 99, 93, 118, 121, 122, 126); the Board date stamp on the back of 414 of the cards corroborates that this clear majority was secured well before the Company's first unfair labor practice; and

450 of the cards bear dates within the relevant time period.[17]

On these facts, the Board was warranted in finding that the more than 450 cards had been properly authenticated. As the Board pointed out, while "some evidence of its genuineness" is necessary before a document may be admitted, that evidence may take the form of an extra-judicial admission (R. 263). The latter "has always been regarded as sufficient; the only question could be whether the party's words or conduct under the circumstances amounted to an admission." 7 Wigmore, *Evidence* § 2132 (3d ed. 1940). The pertinent circumstances here were the Company's opportunity to compare all of the Union's cards against the Company's own records and its agreement to "advise [the General Counsel] as to the signatures [it was] questioning." Thus, the Company's identification of the 24 signatures it questioned after making that comparison plainly carried an implied admission that all of the others were genuine, the Company's refusal to so stipulate notwithstanding. Cf. *National Labor Relations Board* v. *Hunter Engineering Co.*, 215 F. 2d 916, 922-923 (C.A. 8). The cards were likewise timely, for the date of signing "may be presumed from the purporting date of the document" (9 Wigmore, *Evidence* § 2520(b) (3d ed. 1940)), and in any case, as stated

[17] As to the five valid cards remaining, three do not show the year and two are dated after conclusion of the campaign, but all five were in the group of cards received and date-stamped by the Board Regional Office on March 8, 1963 (R. 262, n. 5; see R. 134-144).

above, they were shown to have been collected within the relevant time period.[18]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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National Labor Relations Board.

OCTOBER 1967.

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[18] Since the procedure of a pre-hearing check of the cards was adopted by agreement between the Company's counsel and the General Counsel, there is clearly no basis for petitioner's assertion (Pet. 15) that the procedure utilized here gives the Board "the unilateral right to demand that employers admit or deny authenticity," on pain of being deemed to have admitted it if they simply stand silent.

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